BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KHADER ABRAHA	)	
Claimant	)	
VS.	)	
	)	
ARMOUR ECKRICH MEATS	)	
Respondent	)	Docket No. 1,067,589
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the March 28, 2014, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 26, 2014, preliminary hearing and exhibits thereto; the transcript of the January 29, 2014, discovery deposition of claimant; the transcript of the February 26, 2014, deposition of Trajaun Nash and exhibit thereto; the transcript of the February 26, 2014, deposition of Kimberly Norris and exhibits thereto; the transcript of the February 26, 2014, deposition of John Ohene and exhibit thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges on October 31, 2013, while working for respondent, he stepped on a meat casing, slipped and his legs split, resulting in a left-knee injury. Respondent asserts claimant slipped because he was dancing. Respondent contends the dancing was horseplay under K.S.A. 2013 Supp. 44-501(a)(1)(E) and, therefore, claimant is not entitled to compensation.

The ALJ found as follows:

> Claimant was hurt when he slipped and fell on a wet slick concrete work floor. As soon as he reports the accident, allegations are made he was "dancing" which Claimant denies. Such circumstances could make someone feel insecure about their job even without a direct threat of termination.
>
> It is found and concluded that Claimant was not engaged in horseplay when he was injured. Thus Claimant had an accidental injury that arose out of and in the course of employment.[1]

The sole issue before the Board is: did claimant's accident result because he engaged in horseplay, and, therefore, under K.S.A. 2013 Supp. 44-501(a)(1)(E), he is not entitled to compensation?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant does not speak English and required an interpreter at his deposition and the preliminary hearing. Claimant's job was tying sausage casings. After tying a casing, he would cut off the excess casing and throw it in a bucket. At his deposition, claimant indicated that on October 31, 2013, while performing his job duties, he slipped on a meat casing, his feet split and he slid backward. When asked if he was dancing at the time of the accident, claimant denied doing so. Claimant's shift was 3 p.m. to 3 a.m. and the accident occurred at approximately 1 a.m. He testified that when the accident occurred, Line 3, the line where he worked, was moving.

Claimant testified that John Ohene and Sonya McClinton helped him up and took him to the office of his supervisor, Willie Brown. Claimant indicated he was working with "Sasha" and "Trujan" at the time of the accident. Claimant testified that he injured his left knee and right shoulder, but that his right shoulder is okay. He indicated his physician has recommended left-knee surgery.

Trujaun Nash testified he was working on the same line as claimant on the day of claimant's accident. Mr. Nash testified he saw claimant fall and at the time of the fall, the line was stopped. He did not recall the number of the line where he and claimant were working. Mr. Nash indicated that just prior to falling, claimant was dancing and bending over to grab his bucket. He testified there was no music playing at the time. He initially gave the following testimony concerning the manner in which claimant danced:

> Q. Okay. It's kind of important. What was he doing?

---

[1] ALJ Order at 5.

A. He was moving his legs and his body at the same time. As he was bending over he was doing it, and that's when he slipped and fell.

Q. Okay. So he's moving his arms and his legs as he's bending over, reaching into a bucket?

A. Yes.

Q. So is this kind of like a Russian dance where he starts kicking the legs out to the side and - -

A. Yeah. Something like that.[2]

Mr. Nash also testified that when claimant grabbed the bucket, his feet never left the ground, and he moved his bottom to the left and right. He indicated there were casings on the floor when claimant did the splits, slipped and fell. He stated there was excess meat on the floor where claimant was standing and the meat makes the floor slick. Mr. Nash testified he wears rubber boots and has slipped, but never fallen.

Kimberly Norris, respondent's safety manager, testified she conducted Critical 5 training in 2011, which claimant attended. Ms. Norris testified she communicated with claimant on several occasions in English, without an interpreter. Ms. Norris testified that during the Critical 5 training, claimant never indicated he did not understand the training. One of the slides in the Critical 5 training is entitled "Horseplay" and lists four examples. Dancing is not listed as one of the examples. Ms. Norris testified that she gives no other examples when providing Critical 5 training and never instructed those she trained that dancing was considered horseplay. She did not know if Mr. Nash or claimant were ever told they could not dance at work. Ms. Norris indicated she concluded claimant engaged in horseplay after speaking to Mr. Nash, Mr. Ohene and Vonnie Harriel. She did not ask Mr. Ohene or Mr. Nash to demonstrate how claimant was dancing.

Mr. Nash was questioned about an accident report completed by Mr. Brown. Mr. Nash confirmed the report listed wet floor with casings and WIP product as an unsafe condition. WIP means work in progress. The last page of the report indicated corrective action was directing the sanitation company to keep the floors clean. The accident report listed four root causes: excessive amount of raw material on the production floor; less than safe attitude, indifference; inattention while performing task; and line operator was not monitoring surroundings. Mr. Nash acknowledged dancing was not listed as a root cause in Mr. Brown's report.

[2] Nash Depo. at 15.

Mr. Ohene testified he runs the machines and takes care of the lines. He worked with claimant on the day he slipped and fell. According to Mr. Ohene, the line was not running when claimant fell. He did not see claimant fall. Mr. Ohene testified that about 90 seconds to two minutes before the accident, he observed claimant dancing. He described claimant's dancing as similar to marching. However, Mr. Ohene could not "confirm dancing sent him to the ground."[3] He provided a written statement to respondent and indicated, "At that instance, the floor was not the best condition which I believe contributed to this accident."[4] Mr. Ohene testified claimant was not paying attention to the floor condition which contributed to the accident. He previously slipped on the floor because it was wet, slick and had meat and casings on it.

At the preliminary hearing, claimant gave a similar description of the accident as the one he gave at his earlier deposition. He testified he was not dancing, playing around or doing anything inappropriate when he slipped and fell. Claimant testified he is Islamic and listening to music and dancing is prohibited.

Claimant acknowledged signing a Critical 5 Safety Violation Notice that indicated he was dancing at the time of the accident and that dancing and playing around is considered horseplay. Claimant testified he was told by Dally Sierra, respondent's human resource manager, that if he did not sign the notice, he would be terminated. He testified that he could read the notice in English, but did not understand most of it.

Ms. Sierra met with claimant to explain to him why he was being issued a Critical 5 Safety Violation Notice. She did not speak with Mr. Nash or Mr. Ohene, but reviewed their statements. Ms. Sierra indicated Ms. Norris was also present. Ms. Sierra testified that when she met with claimant, he indicated he did not agree with the notice. However, claimant did not say that he did not understand the notice. Ms. Sierra denied she or Ms. Norris told claimant he would be terminated if he did not sign the notice. She acknowledged the Critical 5 training program is only about ten minutes long.

Mr. Brown testified he began filling out an accident report when claimant was brought to the office after the accident, which was around 1:15 or 1:17 a.m. Mr. Brown took a short break to tell the witnesses to the accident not to go home until he obtained a witness statement from them. He then returned to the office and completed the accident report with claimant. Mr. Brown testified the information for the four root causes of the accident was provided to him by claimant. Mr. Brown indicated he gave claimant an opportunity to complete his own accident report and claimant declined, but gave no reason. When asked how he thought the accident occurred, Mr. Brown indicated that he did not know and only knew what claimant and the witnesses said. He never asked any of the

---

[3] Ohene Depo. at 13.

[4] *Id.* at Ex. 1.

witnesses to demonstrate how claimant was dancing. Mr. Brown never saw claimant dance. He testified that no matter how often the plant floor was cleaned, there was always some product on it.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[6]

K.S.A. 2013 Supp. 44-501 states, in part:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
>
> . . .
>
> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

Respondent asserts claimant engaged in horseplay by dancing. This Board Member finds respondent has the burden of proving claimant's injury resulted from the horseplay.

The only witness who claimed to have observed claimant dance when he slipped and fell was Mr. Nash. Mr. Nash's testimony is inconsistent. He first indicated claimant was dancing like a Russian, but later indicated claimant's feet never moved when he was grabbing the bucket. Mr. Ohene saw claimant dance a minute and one-half to two minutes before falling, but could not attribute the slip and fall to dancing. He indicated claimant's dancing was similar to marching. Claimant testified his religion prohibits listening to music and dancing.

Claimant, Mr. Nash, Mr. Ohene and Mr. Brown all agreed the floor was always wet and slick. Mr. Brown indicated that even if the floor was recently cleaned, it would be slick. Mr. Nash and Mr. Brown testified they had previously slipped on the slick floor. This Board Member finds claimant's slip and fall was caused by the slick floor. If claimant was dancing

---

[5] K.S.A. 2013 Supp. 44-501b(c).

[6] K.S.A. 2013 Supp. 44-508(h)

at the time of his accident, there is insufficient evidence to prove claimant's left-knee injury resulted from dancing on the slick floor.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, the undersigned Board Member affirms the March 28, 2014, Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this 12th day of June, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com

Walter P. Robertson, Attorney for Claimant
wpr.jclaw@gmail.com

Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
mschaefer@McDonaldTinker.com

Honorable Rebecca Sanders, ALJ

[7] K.S.A. 2013 Supp. 44-534a.

[8] K.S.A. 2013 Supp. 44-555c(j).